

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 12, 2009 Session

LISA GOODPASTER RIGGS v. KENNETH LEE RIGGS

Appeal from the Circuit Court for Davidson County
No. 04D-3385 Muriel Robinson, Judge

No. M2008-02229-COA-R3-CV - Filed May 19, 2009

In a prior appeal, husband challenged the trial court's award of alimony *in futuro* to wife. This Court reversed the award, finding that long-term support was inappropriate since wife was capable of supporting herself; the case was remanded for the trial court to make a reasonable award of rehabilitative and/or transitional alimony. On remand, the trial court awarded wife nine years of rehabilitative alimony and husband appealed. We reverse the award of rehabilitative alimony, make an award of transitional alimony and remand the case.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ. joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Kenneth Lee Riggs.

Chadwick W. Stanfill, Nashville, Tennessee, for the appellee, Lisa Goodpaster Riggs.

MEMORANDUM OPINION¹

I. Factual and Procedural History

This matter is before the Court of Appeals for a second time. In the prior appeal, the trial court's award of alimony *in futuro* to wife was reversed and the case remanded for the trial court to

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

make an award of rehabilitative and/or transitional alimony. On remand, the court ordered Husband to pay Wife rehabilitative alimony in the amount of \$1,200 per month for nine years.

Lisa Goodpaster Riggs (“Wife”) filed a petition for divorce on November 18, 2004, alleging irreconcilable differences and inappropriate marital conduct; Wife asked for permanent and pendente lite alimony. On January 13, 2005, the trial court held a hearing and subsequently entered an order requiring Kenneth Lee Riggs (“Husband”) to pay the mortgage and all utilities on the marital residence, \$175.00 per week in pendente lite alimony, and a lump sum of \$450.00 for Wife to obtain and keep her real estate license.

The trial court entered a Final Decree of Divorce on November 30, 2006, awarding Wife a divorce on the ground of inappropriate marital conduct because she was found to be “battered” and “the party with the lesser degree of fault.” The Final Decree of Divorce ordered, among other things, that the marital residence be sold, with Wife maintaining possession until its sale; that Husband’s obligations under the pendente lite order continue until the residence was sold; and that Wife be awarded \$1,200 per month in alimony *in futuro* to begin one month after the sale of the marital residence because she was in a “28 year marriage with absolutely no ability to earn income and is in need of support.”²

In the prior appeal, Husband challenged the trial court’s finding that Wife had no ability to earn an income and its award of alimony *in futuro*.³ This Court⁴ in *Riggs v. Riggs*, 250 S.W.3d 453 (Tenn. Ct. App. 2007) (“*Riggs I*”) reversed the trial court’s award of alimony *in futuro*, holding that “[f]rom the totality of the circumstances in this case, we conclude that, with the aid of rehabilitative and/or transitional alimony, [Wife] ultimately has the ability to support herself.” *Id.* at 459. The case was remanded for the trial court to “fashion a reasonable award of rehabilitative and/or transitional alimony.” *Id.*

A hearing pursuant to the remand was held on August 27, 2008, and the trial court entered its Order from Remand Hearing on September 22, 2008, holding that Husband was to continue to pay Wife pursuant to the pendente lite order until the marital residence was sold or for a period of one year, whichever occurred first, and that, thereafter, Husband “shall pay Wife rehabilitative alimony in the amount of \$1,200 per month for a period of 9 years or until she comes into this Court with the ability to make more than minimum wage with a skill that the Wife has learned.”

Husband appeals contending that the trial court erred in awarding Wife nine years of rehabilitative alimony. We find that the award of long-term support was not supported by the evidence; consequently, the trial court abused its discretion.

² The trial court found that Husband had the ability to pay and that his yearly income was \$70,000.

³ Husband also raised an issue in the first appeal with regard to the trial court’s award of attorney fees, which is not an issue in the current appeal.

⁴ The first appeal was heard by the Western Section while sitting in Nashville.

II. Standard of Review

Review of the trial court's findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(b); *Kaplan v. Bugalla*, 199 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *See Kaplan*, 199 S.W.3d at 635.

The amount and type of alimony to be awarded is within the sound discretion of the trial court in light of the particular circumstances of each case. *Riggs*, 250 S.W.3d at 456-57 (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). The appellate courts will not alter such awards absent an abuse of discretion. *Id.* The Tennessee Supreme Court addressed the abuse of discretion standard in *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001) stating that:

Under the abuse of discretion standard, a trial court's ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Id. at 85 (internal citations omitted). Moreover, the appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy as embodied in applicable statutes. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

III. Analysis

The statutory preference in Tennessee is that “a spouse, who is economically disadvantaged relative to the other spouse, be rehabilitated, whenever possible, by the granting of an order for payment of rehabilitative alimony.” Tenn. Code Ann. § 36-5-121(d)(2). “Rehabilitated” is defined as:

[T]o achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Id.

This case was remanded for the trial court to make a “reasonable award of rehabilitative and/or transitional alimony” based upon the considerations set forth in *Riggs I* and upon the statutory

factors of Tenn. Code Ann. § 36-5-121(i). Specifically, the court was instructed to consider three matters on remand: (1) “the funds needed to get [Wife’s] real estate and/or candy business off the ground,” (2) “the degree, if any, of disability associated with [Wife’s Irritable Bowel Syndrome] IBS,” and (3) “the length of time [Wife] has been receiving the benefits of alimony without any corresponding attempt to help herself.”

In regard to the first matter, Wife called Jean Mays, a current realtor, to testify as to the funds needed to start a real estate business. Ms. Mays stated that a person would need \$20,000 to \$30,000 in start up money to obtain the equipment needed to be successful. She testified that she was earning less than the previous year and that she would not recommend anyone entering the real estate business at the time. On cross examination, Ms. Mays stated that she worked with an agency that allowed agents to use the agency’s equipment for a monthly fee. She also testified that there are jobs at the agency which would not require a real estate license but, on redirect, stated that those positions do require other skills and that she was unaware of any openings for those positions at the time.

Wife, however, testified that she no longer had a desire to work in the real estate business. She stated that she allowed her real estate license to lapse; that she had not shown nor sold any real estate listing as of the date of the original divorce hearing; that she did not believe she could physically meet the challenge of the real estate business; and that the real estate market, at the time of the hearing, was “soft.” Wife also testified that she no longer planned on restarting the candy making business she operated with her mother prior to her mother’s death because of the uncertainty of earning an income; she provided no information relating to the costs of restarting that business. On cross examination, she testified that she had applied for only one job during the period since the entry of the pendente lite order.

In regard to the second matter, Wife testified as to her Irritable Bowel Syndrome (“IBS”) and stated that the condition made it difficult for her to hold a job. On cross examination, she admitted that she never applied for disability and that she was capable of making some income by working at a minimum wage job. She did not provide expert medical testimony relating to any disability attendant to her condition.

In regard to the final matter, Wife testified to a number of reasons why she was unable to work while receiving alimony. First, Wife’s mother and father died in 2006 and she stated that her role as executor of their estates was a “full time job.” Second, Wife claimed that she developed depression as a result of the loss of her parents and that she “did not have the time or mental capacity to work part time during aftermath [sic] of her parents’ death” and that their death “affected her ability or drive to get a job or start school.” Lastly, Wife stated that she spent a lot of time fixing up the marital residence for sale.

Wife testified that her plan for rehabilitation was to work part-time and to go to college part-time to earn a degree.⁵ In her brief, Wife summarized her testimony at trial as stating that it would take “eight (8) years to finish college attending part-time and two (2) years to get established and get a job to support herself without any assistance from [Husband].”

At the conclusion of the hearing, the trial court made the following statements:

THE COURT: ...She says she’s depressed. Of course, there’s no medical proof about that. So I really deep down in my heart under the circumstances here feel that my first ruling was correct, in that she needs some alimony until her death or remarriage.

And [Husband] has the ability to pay that. He’s still working at almost \$70,000 a year, his last tax return. He doesn’t have any proof before me today of his actual income, but he says that he made approximately \$69,000 in 2007.

I still feel that she still needs what I awarded in the first place. I’m under a remand from the Court of Appeals to make it either transitional or rehabilitative.

If she could work an eight-hour day, I feel she could work minimum wage. Nobody is disputing the fact that she has this medical condition. She says she’s had it for 20 years and it’s been a problem.

[Husband] hadn’t denied that. But there still is no medical proof. So I have to take into consideration she might could make minimum wage. If she gets her real estate license back, I don’t feel that she can have any successful career in that if she doesn’t have start-up money.

[Husband] can’t give her start-up money, he says through his lawyer. So having to consider rehabilitation for this woman, it will take a long time.

So the order of this Court will be that [Husband] will pay her rehab alimony, the first section, until this house sells. It will be a continuation of the pendente lite order. For one year or until this house sells, whichever occurs first.

Then [Husband] will continue to pay her the amount of \$1,200 as rehab for a period of nine years or until she comes into this court with ability [sic] to make more than minimum wage with a skill that she’s learned, which would trigger any change of circumstances which would allow me to consider additional proof as to whether or not she’s been rehabilitated or not.

Even though there is a statutory preference for a court to award rehabilitative alimony, the preference “does not entirely displace the other forms of spousal support when the facts of the case warrant long-term or more open-ended support.” *Riggs*, 250 S.W.3d at 456 (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995)). While considering the trial court’s original award of alimony

⁵ The entire documentary proof of Wife’s rehabilitation plan consisted of two pages from the website of Tennessee State University identifying the application deadline for the Spring 2009 semester and the per hour tuition charges and fees.

in futuro,⁶ however, this Court made clear in *Riggs I* that the facts of this case did not warrant long-term or open-ended support, specifically stating that “there is evidence in the record to support a finding that [Wife] is able-bodied, she is able to travel, and to enjoy a social life,” and “[Wife] ultimately has the ability to support herself.” *Id.* at 459. Wife was required to put forth a “reasonable effort” to achieve rehabilitation while receiving alimony, Tenn. Code Ann. § 36-5-121(d)(2), and, on remand, the trial court was instructed to make an award of alimony that would not “rob [her] of any motivation to seek self-sufficiency.” *Riggs*, 250 S.W.3d at 459.

The trial court addressed the issues relating to the funds needed for Wife to resume her business endeavors and determined that it was not feasible for her to do so. While the court mentioned Wife’s IBS, there was, as the court noted, no medical proof of the nature or extent of any disability caused by the condition. With respect to the issue of Wife’s attempts at rehabilitation while receiving alimony, the court stated that “even though [Wife] received the benefit of this Court’s order for some two and a half years,⁷ I don’t see any real change here . . . I feel she comes before me in worse shape at this point.” The trial court made no findings as to the reasonableness of the rehabilitation plan or its potential success but reasoned that Wife’s condition at the time of the hearing required an award of long-term rehabilitative alimony. With respect to transitional alimony, the court stated:

Well, transitional to me doesn’t fit because now she comes before me having lost two parents, she says she’s depressed. There is no candy business now. There is no real estate license now.

While we are mindful of the deference we are to give trial courts in these matters, the record does not show that the facts of this case have sufficiently changed since our ruling in *Riggs I* to warrant an award of long-term support. The court made no findings as to the reasonableness of the rehabilitation plan or its potential success in rehabilitating Wife and the effect of the ruling was to make the same award of alimony *in futuro* that we reversed in the first appeal, reclassified as rehabilitative alimony. The proof at the hearing was that Wife did not desire to restart either of her businesses or to reinstate her real estate license; that her IBS neither disabled nor prevented her from working in some capacity; that her rehabilitation plan was to work part-time while attending college for eight years and take an additional two years “to get established;” and that she failed to make any significant attempts to secure employment or training during the three years she had been receiving pendente lite alimony.

Taken as a whole, the evidence shows that Wife has not put forth a “reasonable effort” to rehabilitate herself in the period since the court’s award of pendente lite alimony and her ten-year rehabilitation plan is too indefinite and speculative to support a finding that it is “reasonable.” The

⁶ “Alimony in futuro, also known as periodic alimony, is a payment of support and maintenance on a long term basis or until death or remarriage of the recipient.” Tenn. Code Ann. § 36-5-121(f)(1).

⁷ The period was actually three and one-half years from the entry of the pendente lite order to the hearing on remand.

trial court's award of rehabilitative alimony for a period of nine years is not supported by the evidence, is an abuse of discretion. *Brown*, 913 S.W.2d at 169. Consequently, we reverse the award of rehabilitative alimony.

Riggs I found that neither alimony *in futuro* nor alimony *in solido* were appropriate awards in this situation, and our review of the evidence following remand leads to the conclusion that rehabilitation is not an appropriate option. Consequently, we have determined that an award of transitional alimony⁸ is appropriate and will consider the duration and amount thereof.

Husband has not appealed the amount of alimony ordered by the trial court and we have nothing in the record before us to hold that the evidence does not support the amount of the award. Husband has been paying \$175.00 per week in pendente lite alimony since January 2005; in addition, since that time, Wife has resided in the marital residence with Husband paying the outstanding mortgage indebtedness and utilities. The final order in this case provided that Wife would list the residence for sale; that, pending the sale, Husband would be responsible for the mortgage and utilities at the residence; and that the payment of alimony *in futuro* would commence one month after the sale of the marital residence. The proof at the remand hearing was that the home had a few viewings and that Wife took the property off the market from December 2007 to February 2008.

We have determined that an award of transitional alimony in the amount of \$1,200 per month for a period of four years is appropriate, beginning the month following the sale of the marital residence. Pending the sale of the residence or further order of the trial court, Husband shall continue to pay \$175 per week⁹ along with the mortgage and utilities. We decline to set a time limit on Husband's responsibility for the mortgage or for the marital residence to be sold, but leave that to the trial court upon proper motion.

IV. Conclusion

For the reasons set forth above, the decision of the Circuit Court is reversed and the case remanded for such proceedings as may be necessary to implement the opinion and judgment of this Court. Costs are assessed against Wife, for which execution may issue if necessary.

⁸ Tenn. Code Ann. § 36-5-121(g)(1) states:

Transitional alimony means a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

⁹ Husband has not appealed that portion of the court's order on remand requiring that he continue to pay Wife pursuant to the pendente lite order until the marital residence was sold or for a period of one year.

RICHARD H. DINKINS, JUDGE